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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-770

ENNIS MONROE AKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR

WRIT OF CERTIORARI

Petitioner, Ennis Monroe Akin, through his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals in Case No. 76-2022 is not officially reported at this juncture, pending an action upon this petition, and is appended hereto (Appendix A, infra, pp.24-44).

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1977. Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc were denied on October 28,

1977. A Petition for Stay of Writ of Mandate pending application for certiorari filed pursuant to F.R.C.P. Rule 41(b), 28 U.S.C. was denied by that Court on November 9, 1977. The jurisdiction of this Court is envoked under U.S. Sup.Ct. Rule 19(b), 28 U.S.C.; and 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioner was indicted on June 7, 1976 for violating 18 U.S.C. Section 2315, prohibiting the sale and distribution of stolen securities. Following trial by jury, he was convicted and sentenced to the custody of the Attorney General for 30 months. [597] 1/

QUESTION PRESENTED

1. Did the procedure employed by the District Court in questioning jurors to determine if they had been prejudiced by an inflammatory newspaper article found in the jury room during trial deny petitioner due process of law and the right to a fair trial guaranteed by both the Fourteenth and Sixth Amendments, respectively?

A. Does the fact that a prejudicial newspaper account of pending proceedings has found its way into the jury room during trial necessitate individual voir dire examination to determine if they have been prejudiced by its content in conjunction with the American Bar Association's Standards Relating to Fair Trial and Free Press Section 3.5(f) (1974), and in opposition to the rule enunciated in Margoles v. United States, 407 F.2d 727 (7th Cir. 1969)?

1/ Bracketed numbers refer to the Reporter's Transcript of the trial.

STATEMENT OF FACTS

On January 27, 1976 certain municipal bonds were stolen from Municorp of California. [390] The total face value of the bonds was $1,491,000; the approximate market value was $1,330,000. [391]

On May 22, 1976 co-defendant Lynn Kucala was introduced to Nick Carbone at the Hilton Hotel near Chicago's O'Hare Airport. [208] One Bob Brown performed the introduction. [117 and 208] In reality, Carbone was Special Agent Dean Naum of the Federal Bureau of Investigation. [117] Naum indicated he had heard Kucala possessed valuable securities that were available for sale. The parties entered into preliminary negotiations for the purchase of the bonds. [118] Agreeing to meet Naum later at the bar in the hotel so Xerox copies of the bonds could be examined, Kucala departed. [120 and 123] When they met again, Kucala stated he was unable to bring the bond copies with him, but he would call the person who had them and arrange another time

for their inspection. [124 and 209] Kucala called the home of co-defendant Jerome Fusco, but no one answered. [209,210] Later, Kucala made a contact with Fusco's daughter and proceeded to Fusco's residence. [210] Kucala obtained the copies and returned to the hotel. [211] Naum examined the copies and indicated that the people he represented would pay $170,000 for the bonds. [125] Kucala stated he would have to call California and check with the person he was representing. [126] Unable to reach this party, Kucala said he would call Naum later in the evening. [127]

At 9:20 that night, Kucala reached Naum by phone. [127] Kucala indicated that his people were willing to accept $200,000 for the bonds. A "side agreement" was arranged whereby Naum would tell his people that the securities were sold for $230,000. [128] The negotiators would then split the $30,000 difference of actual sale price and reported sale price between them. [127,128]

Kucala tentatively agreed to make the switch in a bank in Indianapolis the following Tuesday. [128] On Monday, May 24, 1976, Naum called Kucala confirming readiness to complete the transaction. [129]

At 1:30 A.M. on Tuesday, Mary 25, 1976, Kucala arrived at Weir Cook Airport in Indianapolis. [130] Agent Naum met him at the coffee shop. [131 and 222] Naum indicated that the transfer of cash

and securities was set for the following morning at the American Fletcher Bank. [223] At this points, Naum was not aware that Kucala had flown into Indianapolis with co-defendant Jerome Fusco. [222] Neither Fusco nor Kucala had bonds with them on the flight. [223]

According to Kucala at approximately 8:00 that morning he met with co-defendant Fusco and petitioner in Room 242 of the Airport Hilton Hotel. [225] Kucala explained to them that he was to meet "Nick Carbone" in the hotel lobby a little later and the transaction would take place soon thereafter. [225] Kucala did not see the bonds in the room, but noticed a brown suitcase. [227] Kucala testified that petitioner indicated that only half the bonds were in the room, and that he (petitioner) would have to get the other half. [227] Then petitioner purportedly made a telephone call to an undisclosed person and said, "Come on over". [228] Shortly after this there was a knock at the door, and a suitcase was handed to petitioner. [228] Kucala did not see who handed the suitcase through the door. [228,229]

At 8:45 A.M. federal agents observed two individuals in the hotel lobby who were identified at trial as co-defendants Beverly Lloyd Hart and petitioner. [134,135,136] Later, at 9:00 A.M. Naum and two other agents in their undercover capacity met with Kucala in the lobby. [133] The other agents were posing as a Latin business man, interested in buying the securities, and his body guard. [133]

Naum introduced Agent Walton as "Luis Aguirre". [137] Then Kucala

Kucala indicated enroute that he would examine the money and if it was in order, he would return to the hotel, pick up the securities and come back to the bank to complete the transaction. [137,138]

After arriving at the bank, Kucala examined the money. [138] Stating that it was alright, he returned to the hotel by cab. [138,139] Kucala picked up a suitcase containing the bonds that had been checked with the desk clerk. [230] On his way out Kucala testified that he asked Fusco and petitioner for "something to put the money in". [231] Petitioner handed Kucala an attache case. [232] Then Kucala returned to the bank. [233] He was arrested inside while agents examined the bonds. [233] A simulated arrest of Agents Naum and Walton was also performed at this time. [140]

Some 15 to 20 agents were summoned to the Airport Hilton Hotel. [141] Agents Naum and Walton arrived there at approximately 11:45 A.M. [141]

Agents Richard Bulman and John Boyer arrived at Noon. [5] They immediately proceeded to hotel Room 242. [5,6] Agent Bulman observed that the door to the room was open. [6] He walked into the room. [6 and 39] Agent Boyer also walked in and observed shaving articles in the bathroom. [40] Then the agents went out into the hallway and waited until 1:10 P.M. before going back into the room. [6,7]

During the time they waited Bulman reportedly received information that "someone had consented to the serach of the room". [12] Susan Cooper, the desk clerk at the hotel, testified that it would be permissible for the agents to search the room after 1:00 P.M. [47] She also stated that although check out time was 1:00 P.M., during the course of ordinary business, nothing would be removed from a guest's room at that time of day. [54] Cooper testified that 6:00 P.M. was the new day for billing purposes. [55] No one had paid for the use of the room in question. [49] However, upon billing, payment was received. [49]

At 1:10 P.M. the agents re-entered Room 242 and conducted a search. [7] Toilet articles, glasses, dishes, cups, latent fingerprints, and an airline sticker bearing petitioner's name were confiscated. [9,10]

During trial on August 20, 1976, the defense counsel notified the District Court that the Indianapolis Star had printed an article quoting Judge Dillin's comment made at the time of his ruling on a motion for judgment of acquittal. [454] The article contained the following passage:

> "However Judge Dillin ruled he felt the government had very little difficulty in proving each and all defendants guilty beyond a reasonable doubt." [454]

Defense counsel requested that the judge interrogate each juror individually to determine if any or all had read the article. [454,458] Refusing to do this, Judge Dillin indicated he would collectively ask the jurors whether they had read the article before any juror would be questioned. [455] The judge stated that any other procedure would be "a complete waste of time". [455] Defense counsel urged that the pressure already created by the judge's order prohibiting the reading of media accounts of the trial would make them reluctant to admit, in open Court, that they had read the article. [455,456, and 458]

Nevertheless, the jurors were collectively questioned. [459] Two jurors indicated they had read the paper. [459] Predictably, neither admitted reading the article. [460] However, one juror stated that he had brought the paper into the jury room that morning. [459]

REASONS FOR GRANTING THE WRIT

This case presents the opportunity to reconcile procedures, presently in diametric opposition, employed by the several Circuits, to determine if prejudicial publicity occurring during trial has resulted in denial of both due process and a fair trial.

Of the seven Circuits which have considered the question presented on facts somewhat homologous to those

found in the instant case, three adhere to one posture, while the remaining four adopt the procedure petitioner urges this Court to embrace as the law in the federal Courts of this nation.

The first procedure, subscribed to by the Fifth, Ninth, Tenth and District of Columbia Circuits, as well as the American Bar Association's Standards Relating to Fair Trial and Free Press Section 3.5(f)(1974), demands that jurors be questioned individually to determine whether they have been exposed to such publicity, and if so, whether they have been prejudiced by it.

The second method applied by the First, Fourth, and Seventh Circuits demands only that jurors be questioned collectively to determine if they have been exposed to prejudicial publicity, and upon affirmative response, interrogated on an individual basis to ascertain its effect.

The Circuits are in harmony concerning the admonition of jurors to refrain from reading, watching, or hearing prejudicial news media accounts of proceedings during a trial. Indeed, it is this very admonition which highlights the unfair nature of the collective voir dire process. It is suggested before this Court, as it was in the instant case before the District Court, and Circuit Court of Appeals, respectively, that in the face of repeated entreaties from the bench to avoid

publicity during trial, jurors are reluctant, at best, to admit in open Court that they have been exposed to such media bombardment.

An examination of the long line of decisions dealing with the question of which procedure should be followed might well begin with an explanation of the ruling in the Seventh Circuit's leading case of Margoles v. United States, 407 F.2d 727 (7th Cir. 1969) cert. denied, 396 U.S. 833.

In Margoles defense counsel requested that jurors be interviewed ". . . each one or all collectively . . ." 2/ to determine if any had read newspaper accounts of the trial in progress. Indeed, the Seventh Circuit Court of Appeals, in reviewing the propriety of the District judge's action in collectively questioning jurors to see if they read such articles, stated that counsel got ". . . precisely what . . .[he]. . . had asked for in his motion." 3/ It was from this set of facts, which petitioner submits amount to an unadulterated waiver of the right to have the jury interrogated individually, that the Margoles voir dire procedure was born. That procedure demands in unequivocal language that the jurors must be questioned collectively before any individual examination may begin.

2/ Id. at 734

3/ Id. at 734

> "Thus, the procedure required by this Circuit where prejudical publicity is brought to the Court's attention during a trial is that the Court must ascertain if jurors who have been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further." 4/

It is patently apparent then, that the Margoles holding is tantamount to legislative action by the Court of Appeals. From a fact pattern which highlights acquiescence on the part of defense counsel, the Margoles Court instituted an arbitrary and inflexible procedure for determination of the effect of prejudicial publicity taking place during a trial. This is true even though the Court paid lip service to its own earlier decision in United States v. Accardo, 5/ a case which crystallized the

4/ Id. at 734

5/ 298 F.2d 133,(7th Cir. 1962)

proposition that "[e]ach case must, of course, be decided on its own facts."6/

The injustice of the usage of this procedure in the instant case is show cased by the factual distinction between it and the case before the Court in Margoles. As noted, counsel requested any form of voir dire examination in Margoles. At petitioner's trial counsel clearly and vigorously argued that the jury should be questioned individually to determine if they had read the prejudicial article found in the jury room during the proceedings. [455] In response to defense counsel's plea that pressure created by the judge's admonition prohibiting the reading of media accounts of the trial might make the jurors hesitant to admit having read the article in question, the Court responded that any other procedure would be a "complete waste of time". [455,456]

The opinion of the Seventh Circuit Court of Appeals dramatizes the difficulty that Court experienced in its unconvincing attempt to reconcile the Margoles method with the facts of this case. Citing United States v. Rizzo, 409 F.2d 400,402 (7th Cir. 1969) for the notion that "a different procedure might be appropriate under special circumstances",7/ the Court has, in effect, stated that the unequivocal language

6/ Margoles v. United States, 407 F.2d,727,733

7/ United States v. Akin,No.76-2022 at p.18 (1977)

of Margoles is to be applied at the whim of the District Courts in that Circuit. Petitioner submits that while Margoles breathes life by remaining on the books, the Seventh Circuit Court of Appeals is powerless to contradict itself in such a wholesale manner. One procedure or the other must be the law, and now in addition to the conflict existing between the Circuits on this problem, a conflict has arisen between the decisions within an individual Circuit.

In what appears to be a rather feeble effort to justify its posture on this issue, the Court of Appeals cites a number of its earlier decisions relevant to the disposition of publicity problems occurring during trial. It is submitted that none has so squarely presented this issue as has the instant case, nor do they shed any light on the dilemma that the District Courts will face in the future when confronted with the situation. Indeed, although this Court has refrained from granting its writ of certiorari in the cases cited by the Court of Appeals, it is submitted that none of them presented the precise factual basis found in the instant case on which this Court could frame a decision to end the controversy.

First, in the line of cases cited by the Seventh Circuit as authority for the proposition that the Margoles procedure adequately resolves prejudicial publicity problems taking place during a trial is United States v. Battaglia,

432 F.2d 1115 (7th Cir. 1970) Petitioner submits that Battaglia may be summarily dismissed as unenlightening. The facts surrounding the invocation of the Margoles procedure are not recited in the opinion, and there is no indication regarding objection by trial counsel to the voir dire procedure employed.

In United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) defendant's conviction was reversed when, after a request by counsel for "a hearing to determine the jury's exposure to . . . [an] article, or for a mistrial," the District judge refused to poll the jury. 8/ Although the Margoles procedure rears its head once again, 9/ it is readily apparent that the case does little to clarify the individual versus collective voir dire questions presented here.

Similarly, United States v. Barrett, 505 F.2d 1091 (7th Cir. 1975), cert. denied 421 U.S. 964, adds nothing to a resolution of the instant problem. In Barrett a prejudicial newspaper article was published over a week end break in defendant's trial. Following the Margoles directive, the jury was collectively polled to determine if they had read the article. Receiving a negative response, the trial continued without further inquiry. As noted, in the instant case, the danger

8/ Id. at 1063.

9/ Id. at 1063.

of exposure to the prejudicial article was dramatically greater, since the article in question had found its way into the jury room. Again, the Barrett decision is silent on the collective versus individual voir dire problem.

United States v. Rizzo, 409 F.2d 400 (7th Cir. 1969), cert. denied, 396 U.S. 911, another in a string of cases cited by the Court of Appeals as controlling authority in this case, is likewise off point. In Rizzo, a radio broadcast mentioning defendant's confession which had previously been excluded by the trial Court was the subject of the dispute. The case differs from that found here for the simple reason that the opinion in Rizzo gives no indication whatsoever that the jurors were in a position to hear the broadcast. Again, in the instant case, the article damning petitioner was found in the jury room, and two jurors had indicated they had "looked" at the paper. [459] Rizzo adds nothing to the resolution of the collective versus individual voir dire problem.

Finally, the Court of Appeals notes that the First and Fourth Circuits have adopted the Margoles procedure. 10/ Petitioner suggests that in light of the decision in the instant case, confusing even the application of the Margoles method of juror interrogation, the fact that other Circuits have followed

10/ United States v. Perrotta, 553 F.2d 247 (1st. Cir. 1977); United States v. Hankish, 502 F.2d 71 (4th Cir. 1974)

Margoles should appreciably enhance this Court's willingness to put an end to the disparity existing between the Circuits on this recurrent and important discordance.

The Perrotta, (supra)decision evidences the extent to which the Margoles procedure has misguided the federal Courts when it is contrasted with earlier decisions eminating from the same Circuit. During the Perrotta trial the evening edition of the Springfield Daily News carried the headline: "Judge Bars Raid Cash as Gambling Evidence". One hundred sixty three thousand dollars in currency previously seized from the home of a deceased co-defendant was suppressed because its probative value was outweighed by its prejudicial effect. Defendant's conviction was reversed because the judge failed to poll the jury per counsel's request to determine if the jurors had been exposed to the article. While noting that the subject of during trial publicity was a matter of first impression in the First Circuit, the Court adopted the Margoles procedure of collective voir dire in carte blanche fashion.

An earlier decision of the First Circuit in Patriarca v. United States, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 is in direct opposition to the Perrotta mandate. Patriarca was a case which grew out of the widely publicized Valachi hearings. During voir dire of the jury before

trial, defense counsel requested that the judge ask a single question relating to whether there was any member of the jury who felt that he would be unable to give the defendant a fair and impartial trial. Upon receiving no response from the prospective jurors, and upon counsel's reply of, "Fine, thank you, Your Honor", the trial commenced.

On review by the First Circuit Court of Appeals this procedure was assailed as totally ineffective in ferreting out jurors prejudiced by the pre-trial publicity. While noting that error could not be charged when the District Court complied with the minimal procedure requested by counsel, the First Circuit nevertheless stated:

> "While the Court did all that was requested at this juncture, and cannot under the circumstances of this case be charged with error in not inquiring further, sua sponte, we feel bound to concede that such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity. In cases where there is, in the opinion of the Court, a significant possibility that

jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the Court should proceed to examine each prospective juror apart from the other jurors and prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence. In this we are in accord with the suggestions of Section 3.4 of ABA, Standards Relating to Fair Trial and Free Press, (Tentative Draft, Dec. 1966), pp.130-137."
[402 F.2d 318]

Petitioner submits that the dramatic distinction between the tone of the Perrotta and Patriarca decisions is the handiwork of the ill reasoned Margoles case. Moreoever, since Perrotta was cited by the Seventh Circuit in petitioner's case,11/ it can hardly be said that the mare's nest of confusion disseminated by Margoles is undoing itself.

11/ United States v. Akin,No.76-2022 at p. 18 (1977)

Indeed, the alternative method advocated by petitioner is congruant with the weight of authority. Collective inquiry of jurors to determine if they have read or heard prejudicial media accounts of a pending trial is the procedure embraced by the Fifth, Ninth, Tenth and District of Columbia Circuits. United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1974); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974),cert. denied, 419 U.S.1120; Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S.1022; Mares v. United States, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963; Hall v. United States, 396 F.2d 428 (10th Cir. 1968), cert. denied 393 U.S. 986; Coopedge v. United States, 272 F.2d 504 (D.C.Cir. 1959), cert. denied, 368 U.S. 855.

In addition, as the Seventh Circuit was imminently aware when it issued its decision affirming petitioner's conviction, the American Bar Association's Standards Relating to a Fair Trial and Free Press Section 3.5(f), (1974) are in accord with the position petitioner urges this Court to adopt.

> "(f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.
>
> "If it is determined that material disseminated

during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the Court may on its own motion or shall on the motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in Section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if reference to the material in question at the trial itself would have required

a mistrial to be declared."

Futhermore, petitioner urges this Court to exercise its supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal Courts. McNabb v. United States, 318 U.S. 332 (1943). A similar situation to that present in the instant case served as a basis for this Court issuing its writ of certiorari in Marshall v. United States, 360 U.S. 310 (1959). In Marshall, defendant was convicted of unlawfully distributing drugs without a prescription from a licensed physician. During the trial two prejudicial newspaper articles were published. The District Court judge individually interrogated the jurors to determine if they had read the articles. Some of them had read them, although all jurors polled stated they would not be influenced by the content of the articles. The District judge denied defendant's motion for a mistrial. On certiorari, this Court reversed defendant's conviction. While paying homage to the "special facts" doctrine alluded to, supra, this Court stated:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to

> be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecutor's evidence."
> [360 U.S. 312, 313]

Petitioner submits that the same brand of prejudice meriting reversal in Marshall is present in the instant case. In a situation in which a statement made by the District Court judge summarily pronouncing all defendants guilty beyond a reasonable doubt finds its way into the jury room, a more intimate form of interrogation than "raise your hand if you've read the article" is necessary to ensure the juror's minds have not been poisoned.

CONCLUSION

Long ago then District Judge Marshall stated:

> "The great value of a trial by jury certainly consists in its fairness and impartiality. Those who prize the institution, prize it because it furnishes a tribunal which may be expected to be influenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, as is secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him. . ."
> United States v. Burr, 25 Fed.Cas.page 49 (Case No. 14,692g), (1807)

Based on the foregoing arguments and points and authorities, petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-2022
UNITED STATES OF AMERICA,

Plaintiff-Appellee.

v.

ENNIS MONROE AKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 76-82-CR—S. Hugh Dillin, *District Judge.*

ARGUED MAY 23, 1977—DECIDED SEPTEMBER 26, 1977

Before CASTLE, *Senior Circuit Judge,* WOOD, *Circuit Judge,* and MARKEY, *Chief Judge.**

WOOD, *Circuit Judge.* Bearer bonds and municipal bonds with a face value of $1,491,000 were stolen from MuniciCorp of California on January 27, 1976. Defendants-appellants Ennis Monroe Akin and Beverly Lloyd Hart (hereinafter collectively referred to as defendants) were subsequently found guilty after a trial by jury of violating 18 U.S.C. § 2315.[1] Defendant Hart was

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

[1] Jerome James Fusco and Lynn Joseph Kucala were also indicted along with defendants. Kucala pled guilty and testified on behalf of the Government. Fusco was tried and convicted along with defendants but has not joined in this appeal.

found not guilty of the second count of the indictment which alleged that he had transported stolen securities in interstate commerce. Defendants on appeal assert the following: 1) evidence gained from a warrantless search of Akin's hotel room should be suppressed; 2) the district court conducted an insufficient *voir dire* when during the course of trial a newspaper article containing prejudicial information was found in the jury room; 3) the prosecutor engaged in prejudicial misconduct; and 4) the record contains insufficient evidence to support the conviction of defendant Hart.

We find for the following reasons that the convictions of the defendants should be affirmed.

The facts are briefly as follows:

On May 22, 1976, Dean G. Naum, a special agent for the Federal Bureau of Investigation who was posing as Nick Carbone, was introduced to Joseph Kucala. Kucala was using the name Lenny McNamara. This meeting took place at the O'Hare Hilton Coffee Shop in Chicago, Illinois. During this meeting, Kucala indicated that he had municipal bonds and bearer bonds "taken during a score in California." Naum stated that before he could purchase the stolen bonds, he would have to look at the bonds and then check with the people he was working for. Naum stated that he was representing a Latin-American businessman who was interested in purchasing stolen securities.

At 3:30 p.m. that afternoon, Kucala produced xerox copies of the bonds for Naum's examination. After examining the copies of the bonds, Naum offered to purchase the bonds for $170,000. Kucala tried several times unsuccessfully to telephone a contact in California to check on the price.

At 9:20 that evening, Kucala telephoned Naum in his hotel room and stated that his people would accept $200,000 for the bonds. A side agreement was arranged whereby Naum was to tell his people that the bonds would cost $230,000 while he and Kucala split the $30,000 difference. Naum and Kucala tentatively agreed that the transaction could be consummated on the following Tuesday in Indianapolis, Indiana.

At 1:30 or 1:45 a.m. on the morning of May 25, 1976, Kucala and Naum met in the lobby of the Indianapolis Airport Hilton Hotel in Indianapolis, Indiana. Kucala and Naum then went to a coffee shop at the Indianapolis airport to discuss the sale of bonds. Naum stated that the transaction was to be completed in the conference room of a bank. Kucala replied that he would have to check with his people to determine if this was acceptable. Naum and Kucala agreed to meet at 9:00 a.m. in the lobby of the Indianapolis Airport Hilton Hotel.

Kucala testified that at 8:00 a.m. on the morning of May 25, he met with defendants Fusco and Akin in Room 242 of the Indianapolis Airport Hilton Hotel. According to Kucala, both Akin and Fusco expressed reluctance about having the transaction take place in a bank. Kucala also stated that he did not see the bonds while in room 242. He only saw a brown suitcase. According to Kucala, Akin referred to the brown suitcase and stated that only one-half of the bonds were there and that he would have to get the remainder of the bonds. Akin then made a telephone call and instructed someone to "come on over." Moments later there was a knock on the door, a suitcase was handed in to Akin and the door closed. Kucala did not see who handed the suitcase to Akin.

Shortly before 9:00 a.m. on May 25, Naum went to the lobby of the Indianapolis Airport Hilton Hotel and waited for Kucala. Naum observed an individual, who he identified at trial as defendant Hart, sitting diagonally across from him. In addition, a second individual who Naum identified as defendant Akin came up to defendant Hart and briefly spoke with him. Kucala entered the lobby several minutes later.

Special Agent Walton, who was posing as a Latin-American businessman for whom Naum was working, and Special Agent Silva, who was acting as Walton's bodyguard, were introduced to Kucala. Naum, Kucala, Walton and Silva then drove to the American Fletcher Bank, Nora Branch. During the drive to the bank, Kucala stated that he would first examine the money at the bank and, if all was in order, return to the hotel for the bonds and then come back to the bank to complete the transaction.

Upon arrival at the bank, Kucala checked the money and then returned to the Indianapolis Airport Hilton Hotel for the bonds. Kucala picked up a brown suitcase at the front desk of the hotel which contained the bonds. As Kucala was about to leave for the bank, he realized that he needed something to put the money in. At that moment, he saw Akin and Fusco walking to the hotel. After explaining his need, Akin gave Kucala his (Akin's) attache case. While still in front of the hotel, Kucala saw Akin and Fusco with a third individual whom he was unable to identify at trial. Kucala returned to the bank and was arrested by agents of the FBI.

After Kucala's arrest, FBI agents searched room 242 at the Indianapolis Airport Hilton Hotel and found the fingerprints of defendants Hart, Fusco, and Akin.

1. Motion to Suppress.

Defendants moved prior to trial to suppress the evidence discovered in the warrantless search of room 242 after the arrest of Kucala. A brief description of the events leading up to the warrantless search of room 242 follows.

Shortly before noon on May 25, 1976, and after Kucala's arrest, FBI agents learned from the desk attendant at the Indianapolis Airport Hilton that defendant Akin, the occupant of room 242, had not yet checked out of the hotel. Special Agents Blackketter, Keenan, Bulmahn, and Boyer then proceeded to room 242 in an effort to find defendant Akin for questioning. The agents found the door to room 242 wide open. Agents Bulmahn and Boyer entered the room looking for a cleaning maid and left when they did not find a maid in the room. Agent Bulmahn stated that although he was in the room for only a brief time, he recalled seeing a number of toilet articles in the bathroom. Agent Blackketter looked in but did not enter the room and then proceeded down the hallway where he saw a cleaning maid's cart. The maid informed Blackketter that she had not yet cleaned room 242 and did not know whether the occupant of that room had checked out.

Thereafter, Blackketter and Keenan went down to the hotel front desk while Bulmahn and Boyer stayed in the hallway outside of room 242. Blackketter and Keenan asked to speak to the person in charge of the hotel and were referred to Susan Kay Cooper, secretary to the General Manager of the hotel. Ms. Cooper indicated that she had authority to act in the absence of the General Manager and brought out the registration card for room 242. The registration card indicated that defendant Akin had rented room 242 for one night and that he had checked in on the evening of May 24. The registration card also reflected that defendant Akin had not yet paid for either the room or for charges from room service.[2] Ms. Cooper did not find any indication that defendant Akin planned to stay in the hotel for an additional day. Neither was there evidence that defendant Akin had permission to leave the hotel and pay at a later date. In response to the agents' request to see the room, Ms. Cooper stated that they could enter the room if it was not paid for by 1:00 p.m. Although an individual would not be billed for an additional day until after 6:00 p.m., Ms. Cooper stated at trial that 1:00 p.m. was the hotel check-out time. According to Ms. Cooper, the 1:00 p.m. check-out time enables the maids to make the hotel rooms ready for the new occupants. Ms. Cooper further testified that the maids have pass keys and are instructed to let the housekeeper know whether a room is vacant. Ms. Cooper also stated that although people who rent a room for one day occasionally stay for a longer period of time, they usually let the hotel know in advance of their change in plans.

When room 242 was not paid for by 1:00 p.m., Ms. Cooper at 1:10 p.m. went up to room 242 with the FBI agents. Ms. Cooper found the door to room 242 open, stopped in the doorway and saw no signs of occupancy in the room. Ms. Cooper stated that the rooms are designed so that luggage or clothing hanging in the closet can be seen from the doorway. After concluding that the room was not occupied, Ms. Cooper gave the agents permission to enter the room. The agents found various toilet

[2] Ms. Cooper at trial testified that a bill for the room was mailed to Akin on June 2 and that payment was not received until June 30, 1976.

articles in the bathroom as well as glasses, cups, dishes and discarded papers. Several of these articles as well as latent fingerprints found in room 242 were introduced in evidence.

The district judge denied the motion to suppress finding that the evidence demonstrated that Akin had abandoned the hotel room. The lower court first ruled that room 242 was abandoned at the time of the initial entry shortly before noon when the agents found the door wide open and there was neither luggage in the room nor suits hanging in the closet. In addition, the district judge pointed out that the FBI agents chose not to rely on the abandoned state of the room but rather refrained from undertaking a search until after the check-out time when permission was given by Ms. Cooper.

Although room 242 was rented by and subsequently paid for by defendant Akin, defendant Hart, as well as defendant Akin, asserts that the district court erroneously denied the defendants' motion to suppress. Defendant Hart claims that he was standing to contest the validity of the search of room 242 for two reasons. First, defendant argues that the Government failed to challenge his standing in the district court. We find, however, that on pages 5 and 6 of the Government's Response to Defendant Hart's Pretrial Motions, filed on July 30, 1976, the Government questioned defendant's standing. Defendant Hart, citing *United States v. Mulligan*, 488 F.2d 732 (9th Cir. 1973), *cert. denied*, 417 U.S. 930, also asserts that his motion to suppress is in effect a claim of a proprietary interest in room 242. We cannot agree with defendant's argument on this point. The court in *Mulligan* ruled that although a car was registered under a fictitious name, Mulligan was the true proprietor of the car and therefore had standing to contest the validity of the search of the car. In the present case, however, the record does not show that defendant Hart had any proprietary interest in room 242.

As has often been stated, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by

the introduction of damaging evidence." *Alderman v. United States*, 394 U.S. 165, 171-2 (1969), cited in *United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078. We find that defendant Hart falls in the latter category and, therefore, cannot contest the validity of the search of room 242.

Defendant Akin argues that the district judge erred in denying the motion to suppress for the following reasons: 1) the hotel room was not abandoned at the time of the search; 2) the desk clerk had no authority to consent to the search of the room; and 3) at the time of the search, defendant Akin retained a reasonable expectation of privacy in room 242.

For the following reasons, we find defendant's contentions to be without merit.

"A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office." *Hoffa v. United States*, 385 U.S. 293, 301 (1966). Fourth Amendment protection, however, is dependent on the right to private occupancy of the room since at the conclusion of the rental period, "the guest has completely lost his right to use the room and any privacy associated with it." *United States v. Croft*, 429 F.2d 884, 887 (10th Cir. 1970). At the conclusion of the occupancy period, the hotel manager may enter the room or consent to its search. *United States v. Parizo*, 514 F.2d 52, 54 (2d Cir. 1975). The question of intentional abandonment is, therefore, a necessary inquiry only during the rental period when defendant has "sufficient control over the premises to establish a right to privacy therein." *Parizo*, 514 F.2d at 55.

We agree with the district judge that the room was abandoned at the time the FBI agents entered room 242 shortly before noon on May 25. The test for abandonment is whether the complaining party retains a reasonable expectation of privacy in the premises. *United States v. Wilson*, 472 F.2d 901, 902 (9th Cir. 1972), *cert. denied*, 414 U.S. 868. Abandonment raises questions of fact and intent of the person who allegedly abandoned the property. *United States v. Minker*, 313 F.2d 632 (3rd Cir. 1962), *cert. denied*, 372 U.S. 953.

Friedman v. United States, 347 F.2d 697 (8th Cir. 1965), *cert. denied*, 382 U.S. 946. As the trial judge pointed out, the door of room 242 was wide open and there was neither luggage nor suits in the room. We agree with the district judge that the toilet articles left in the room could have been easily overlooked by defendant Akin and do not, therefore, demonstrate that the room was not abandoned. Nor do we find support for defendant's assertion that the door was left open by a maid for the purpose of making the bed. According to Agent Blackketter, the maid only said that she had not yet cleaned the room. In addition, although defendant was not arrested until early June, 1976, there is no evidence that defendant ever returned to room 242. On the basis of these facts, we cannot say that the district court's conclusion was clearly erroneous.

In addition, as the district judge pointed out, the FBI agents waited until permission from Ms. Cooper was obtained after the 1:00 p.m. check-out time to undertake a search of the room. At the time Ms. Cooper consented to the search, rent from the prior day had not been paid and there was neither an indication of occupancy nor arrangements for an extension of the rental period. Since the record supports the district court's conclusion that the rental period ended at the 1:00 p.m. check-out time rather than at 6:00 p.m. when an individual would be billed for an additional day, Ms. Cooper as the authorized representative of the hotel had the authority to consent to the search of the room.

Finally, defendant erroneously relies on *Stoner v. California*, 376 U.S. 483 (1964), for the proposition that Ms. Cooper did not have authority to consent to the search of the room. The court in *Stoner* ruled that hotel employees do not possess blanket authority to authorize searches of the rooms of hotel guests. Ms. Cooper's consent in the present case, on the other hand, was given after the expiration of the rental term and was, therefore, proper.

2. Prosecutor's Opening Statement.

The district judge prior to trial instructed the parties not to discuss in opening statement who might have robbed MuniciCorp of the securities. The Government assented to the court's instructions but stated that it would "include in opening argument the fact that the defendant Hart was at MuniciCorp approximately five times before the robbery and did have a friend there by the name of Norton Giffis . . ." (Tr 95-6). The district judge replied, "Well, I assume you will be able to prove it." (Tr. 96) Thereafter, in overruling defendant Hart's objection to the Government's anticipated opening statement linking defendant Hart to MuniciCorp, the district judge more fully explained his ruling:

> Well, if this place was robbed, if any of these defendants spent any time there at or about the time of the robbery, I think the Government can show that. That's not to say that showing the defendant had a conversation with somebody, who somebody else says was a robber, and which hasn't been proved in a court of law. (Tr. 100-101).

Thereafter, the Government during opening statement indicated that the following evidence would be introduced:

> One last item that will be introduced as evidence is that this man Hart, who was here in Indianapolis registered under the name of Harris at the hotel, had a friend who worked at MunieiCorp by the name of Norton Giffis, and that friend will come here before you and will testify about the visits that Mr. Hart made to MunieiCorp out in California. (Tr. 110-11).

During the course of trial, counsel for defendant Fusco objected to the anticipated testimony of Mr. Giffis. In response to inquiry from the district judge, the Government stated that Mr. Giffis' testimony was material because it showed that defendant Hart was familiar with the scene of the robbery. In addition, the Government stated that Giffis would testify that defendant Hart telephoned him twice on June 13, 1976.

According to Giffis, Hart allegedly twice asked whether anyone was looking for him and also stated, "Well, I've got a beef down in San Diego, and I have to turn myself in to my attorney Wednesday." (Tr. 320). In refusing to allow Giffis to testify, the district judge stated that both the importance of defendant Hart's conection with Giffis and the purpose of the June 13 telephone conversation were speculative and neither supported an inference of guilt. (Tr. 320-24, 357). During argument on this point, the following colloquy took place between the court and Mr. Darst, attorney for the Government:

> Mr. Darst: Your Honor, we disclosed this to the Court before opening statement.
>
> The Court: Well, you didn't disclose the statement to the Court. You just said in a general way that you had a witness by the name of Giffis who was going to put Mr. Hart in this place of business.
>
> Mr. Darst: That is correct.
>
> The Court: And I naturally assumed that it would be at a time about the time of the robbery, where it could be inferred, for example, that he was casing the joint or some such thing. (Tr. 322).

Defendant Hart argues that the Government knew before trial that Giffis' testimony did not show a recent and probative connection between defendant and MuniciCorp. Citing ABA Standards, The Prosecution Function § 5.5 (1971)[3] and Fed. R. Evid. 103(c),[4] defendant

[3] ABA Standards, The Prosecution Function § 5.5 provides as follows:

> In his opening statement the prosecutor should confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief statement of the issues in the case. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

[4] Fed. R. Evid. 103(c) provides:

> (c) hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Hart asserts that the Government improperly misled the court into believing that evidence from Giffis' testimony would support the inference that defendant was casing the scene of the robbery prior to the robbery. Defendant further contends that although the court instructed the jury that arguments of counsel were not to be considered as evidence, failure of Giffis to testify left the jury with the impression that Government evidence linking defendant Hart to the robbery was not being presented because of opposition by defendant. Defendant Hart concludes that since only circumstantial evidence implicated him in the crime charged, the Government's improper remarks were not harmless error.

Where a statement by the Government in opening argument is not substantiated at trial because of a subsequent ruling by the trial judge, both the good faith on the part of the prosecution and the impact of the statements in the context of the particular trial must be assessed.[5] *United States v. Prieto*, 505 F.2d 8, 12 (5th Cir. 1974); *United States v. Wallace*, 453 F.2d 420, 422 (8th Cir. 1972), *cert. denied*, 406 U.S. 961. Contrary to defendant's argument in the present case, we find in the record no evidence of bad faith or professional misconduct on the part of the Government since, at the time of its opening statement, it was not unreasonable for the Government to believe that Giffis' testimony would be allowed into evidence. See *Frazier v. Cupp*, 394 U.S.

[5] Mr. Chief Justice Burger recently described the purpose and scope of opening statement as follows:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.
>
> *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (concurring opinion).

731, 736-37 (1969). In addition, we do not find that defendant's case was prejudiced as a result of the Government's mention in opening argument of the anticipated testimony of Giffis. The Government's reference to Giffis' testimony was brief and not given undue emphasis. See *United States v. West*, 486 F.2d 468, 472 (6th Cir. 1973), *cert. denied*, 416 U.S. 955. In addition, the jury was expressly instructed not to consider statements by counsel as evidence. *Frazier v. Cupp*, 394 U.S. at 735. Furthermore, although defendants objected to Giffis' testimony, defendants failed to point out to the trial judge the alleged error resulting from the unsubstantiated statement in the Government's opening statement and move for that reason for a mistrial, a new trial or a curative instruction. As the court stated in *United States v. Wallace*, 453 F.2d at 422:

> No one should be more cognizant of possible prejudicial trial error at the time of trial than the counsel for a defendant. A reviewing court may consider this circumstance in weighing the alleged prejudicial effect on the jury. Counsel's failure to raise an objection points up the difficulty of our finding prejudicial effect on the jury.

Finally, we think the Government rather than defendant was hurt by this failure of proof. See *United States v. Smith*, 253 F.2d 95, 98 (7th Cir. 1958), *cert. denied*, 357 U.S. 919.

Thus, for the foregoing reasons, we find that the impact of this statement on the trial was *de minimis*. As the court stated in *Frazier v. Cupp*, 394 U.S. at 736:

> . . . It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the

> actual presentation constitutes reversible error, when a proper limiting instruction has been given.

3. Sufficiency of Evidence Supporting Defendant Hart's Conviction.

Defendant Hart asserts that the record contains insufficient evidence to support his conviction. Defendant contends that the Government failed to prove that defendant was either associated with or a participant in the criminal venture.

Viewing the evidence in a light most favorable to the Government, *United States v. Kelly*, 527 F.2d 961, 965 (7th Cir. 1976), we find that there was sufficient evidence for the jury to find defendant guilty of the crime charged in count 1.

First, defendant Hart's fingerprints were found in room 242 along with the fingerprints of defendants Akin and Fusco. In addition, hotel reservations for defendants Hart, Akin, and Fusco were all made by Akin's wife, Eugenia. The evidence further showed that defendant Hart registered under the false name of Harris at the Indiana Hilton Hotel. The parties stipulated at trial that Harris' handwriting matched defendant Hart's handwriting. The evidence also demonstrated that after defendant Hart was mistakenly given a room on the first floor of the hotel, he requested to be moved to a room on the second floor where defendants Akin and Fusco had rooms because "they were working close together and they had work to do." (Tr. 258). Similarly, Agent Naum saw defendants Hart and Akin conversing in the lobby of the Indianapolis Airport Hilton Hotel on the morning of May 25, 1976. There was also evidence which showed that telephone calls were exchanged between defendants Hart and Akin. Furthermore, at the time defendant Hart was arrested, Eugenia Akin's telephone number was found in his wallet.

The evidence already referred to must be viewed in the context of additional proof which demonstrated that an individual in addition to Akin, Fusco and Kucala was involved in this criminal transaction. For example, Kucala testified that moments after Akin made his telephone call, an unidentified individual handed a suitcase filled with stolen bonds to Akin in room 242 on the morning of May 25, 1976. As has already been stated, defendant Hart's room was in close proximity to room 242. In addition, Kucala stated that he saw an unidentified man with Akin and Fusco in front of the Indianapolis Airport Hilton just before he (Kucala) returned to the bank with the stolen bonds.

As this court stated in *Kelly*, 527 F.2d at 965:

> . . . we must accept the tenet that all reasonable inferences supporting the verdict are in favor of the government . . . and that it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts.

In light of the evidence which we have summarized, we find that there was sufficient evidence for the jury to conclude that defendant Hart was the fourth participant in this criminal venture.

4. Prejudicial Publicity.

The *Indianapolis Star* on August 20, 1976, printed an article with the headline, "Three men refused acquittal in bonds case." The article stated in part, "However, Judge Dillin ruled he felt the Government had very little difficulty in proving each and all defendants guilty beyond a reasonable doubt." Defendants requested that the trial judge question each juror individually and outside of the presence of each other as to whether they had read this article. The district judge refused stating that individual interrogation would be appropriate only if any of the jurors had read the article. The court

thereafter collectively questioned the jury and determined that no juror had read the article in question.[6]

Defendant Akin argues on appeal that the trial judge's failure to interrogate jurors individually constitutes reversible error. Defendant asserts that the collective *voir dire* deprived him of the right to a fair trial and the right of due process of law.

The circuits are split as to the procedure to be followed when possible prejudice from publicity arises during the course of a trial. Our circuit has consistently

[6] The district judge asked the jury the following questions:

By the Court:

1 Q. My first question is: How many of you, if any, subscribe to the Indianapolis morning newspaper—Indianapolis Star? May I see your hands, please.

(Several hands raised.)

2 Q. Okay. Three, six—seven. How many of you read your paper this morning, if any?

A. (J-7) I glanced at it.

3 Q. You glanced at it. No one else read the morning Star at all; is that it?

A. (J-9) Just a little bit.

4 Q. Anyone bring it in to the jury room this morning?

A. (J-7) I did.

5 Q. Yours is back there. All right. Anybody else?

(No response.)

6 Q. All right. You have the paper, and glanced at it Mrs. Rhodes, is it?

A. (J-9) Just the front page.

7 Q. Well, there was a little item back on page 7 about this trial which has an inaccurate statement in it. Did either one of you ladies read that?

A. (Jurors 7 and 9 shook their heads.)

8 Q. Did not read it all. Okay.

The Court: All right. We are going—Since this item is in there, I guess we are going to have to remove your paper from the jury room. Well, we will remove page 7.

. . .

(Tr. 459-60).

required the following procedure as set forth in *Margoles v. United States*, 407 F.2d 727, 735 (7th Cir. 1969), *cert. denied*, 396 U.S. 833:

> Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further.

See also, *United States v. Battaglia*, 432 F.2d 1115 (7th Cir. 1970), *cert. denied*, 401 U.S. 924; *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972); *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1975), *cert. denied*, 421 U.S. 964; *United States v. Rizzo*, 409 F.2d 400 (7th Cir. 1969), *cert. denied*, 396 U.S. 911. This approach has also been adopted by the First Circuit in *United States v. Perrotta*, 553 F.2d 247 (1st Cir. 1977), and by the Fourth Circuit in *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974). Other courts have concluded that each juror should be questioned separately out of the presence of the other jurors. *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120; *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022; *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974); *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967), *cert. denied*, 394 U.S. 963; *Hall v. United States*, 396 F.2d 428 (10th Cir. 1968), *cert. denied*, 393 U.S. 986; *Coppedge v. United States*, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855[7]. See

[7] As has been indicated, the Fifth Circuit in *Schrimsher* and the Tenth Circuit in *Hall* expressed a preference for individual questioning of jurors outside of the presence of other jurors. In both cases, the collective inquiry made by the district judge was found not to be prejudicial error under the circumstances.

also, ABA Standards, Fair Trial and Free Press § 3.5(f) (1968).[8]

As defendant points out, this case differs factually from *Margoles* in that defendant in *Margoles* requested that the jury be polled either individually or collectively while defendants in the present case requested only that the jurors be individually questioned. We do not find that this difference requires this court to adopt a different procedure.

We are not, as defendant suggests, following an inflexible procedure which may be inadequate for certain situations. As this court stated in *United States v. Barrett*, 505 F.2d at 1100:

> Each case of alleged prejudicial publicity must rest on its "special facts." *United States v. Jamison*, 339 F.2d 916, 920 (7th Cir. 1964). "The severity of the threat depends upon both the nature of the information so publicized and the degree of juror exposure to it. Moreover, the judge's response is to

[8] ABA Standards, Fair Trial and Free Press § 3.5(f) provides:

> (f) Questioning jurors about exposure to potentially prejudicial material in the course of the trial; standard for excusing a juror.
>
> If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept. The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

The court in *United States v. Hankish*, 502 F.2d at 77, after considering § 3.5(f) stated, "We believe this recommendation has merit but goes too far."

> be commensurate with the severity of the threat posed." *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972).

Thus, a different procedure might be appropriate under special circumstances. See *Rizzo*, 409 F.2d at 402. We agree with the First Circuit's statement in *Perrotta*, 553 F.2d at 250, n. 6, that a district judge may conclude in the exercise of his sound discretion and under the particular circumstances of a case that the situation is one "where individual inquiry will be the preferred course from the outset, just as in less sensitive situations collective inquiry will be more economical of time and less distracting."

We find that the district judge under the circumstances of this case did not abuse his discretion in collectively questioning the jury and preceding no further. The article which contained the prejudicial material appeared on page seven of the *Indianapolis Star*. Neither of the jurors who read the paper on the morning of August 20 indicated that they had seen the prejudicial article. We find no reason to disbelieve their response. This is especially true in light of the fact that the court repeatedly admonished the jury not to read newspaper accounts of the trial. (Tr. 170, 268, 327, 435, 510). Under these circumstances, the district judge was not required to proceed further. *United States v. Solomon*, 422 F.2d 1110, 1116-17 (7th Cir. 1970), *cert. denied*, 399 U.S. 911; *United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970), *cert. denied*, 402 U.S. 905.

5. Government's Questioning of Witness Kucala.

Defendant Akin contends that the Government committed reversible error during its direct examination of Kucala. First, defendant Akin argues that the leading question asked of Kucala by counsel for the Government prejudicially intimated that Kucala had spoken with Akin during his negotiations with Agent Naum. After reviewing the record, we cannot say that the leading questions asked by the Government prejudiced defendant Akin's trial. Akin's name was not mentioned in the

complained of portion of the transcript. Furthermore, we cannot understand how any intimation of Akin's involvement in the negotiations was prejudicial in light of Kucala's testimony which consistently described defendant Akin as being deeply involved in this criminal venture.

Defendant Akin also complains that the Government improperly refreshed the recollection of Kucala with prior statements of Kucala. We cannot find any prejudice to defendant Akin in the complained of portion of the transcript.

CONCLUSION

For the foregoing reasons, the conviction of defendants Hart and Akin is hereby affirmed.

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No. 77-770

In the Supreme Court of the United States

OCTOBER TERM, 1977

ENNIS MONROE AKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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In the Supreme Court of the United States

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No. 77-770

ENNIS MONROE AKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 562 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1977. A petition for rehearing was denied on October 28, 1977. The petition for a writ of certiorari was filed on November 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court erred in refusing to ask jurors individually whether they had read a newspaper article about the trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of selling and disposing of stolen securities, in violation of 18 U.S.C. 2315, and sentenced to 30 months' imprisonment. The court of appeals affirmed (Pet. App. A).

On January 27, 1976, municipal bonds with a market value of approximately $1,330,000 (Tr. 390-391) were stolen from MuniciCorp, a California corporation (Tr. 388). The evidence at trial, much of which was provided by Lynn Kucala, a co-defendant who pleaded guilty, established that petitioner, Kucala, and co-defendants Beverly Hart and Jerome Fusco arranged to sell these securities to an undercover FBI agent for $200,000 (Pet. App. 25 n. 1, 26-28).[1]

While the trial was in progress, an item appeared on page seven of the morning newspaper, the *Indianapolis Star*, that described the court's denial of defendants' motion for a directed verdict as follows: "However, Judge Dillin ruled he felt the Government had very little difficulty in proving each and all defendants guilty beyond a reasonable doubt" (Tr. 454). Defense counsel brought this article to the court's attention and requested an individual *voir dire* of the jurors to determine if any of them had seen the article and to assess its impact (*ibid.*).

The court agreed that individual questioning was appropriate if any of the jurors had read the article, but declined to question them individually as to whether they

[1]Hart and Fusco were also convicted. Hart was sentenced to seven years' imprisonment and Fusco and Kucala each received sentences of 30 months' imprisonment, of which six months was to be served and the remainder suspended, with two years' probation.

had seen the article (Tr. 454-459). The judge stated that individual questioning on this point would tend to excite the jurors and create an inappropriate "aura of mystery," and that it was not likely that many would even have read the paper, which had limited circulation (*ibid.*). He also rejected petitioner's suggestion that the interrogation take place in the absence of counsel and court reporter (Tr. 456). As the government counsel noted, this would be a "highly offensive" procedure in the middle of a trial (Tr. 457). The court then proceeded to inquire how many jurors had read the newspaper that morning. Two jurors stated that they had glanced at the paper, and one of these said that she had brought a copy of the newspaper into the jury room. Further questioning showed that neither juror had seen the article in question (Tr. 459-460; see also Pet. App. 40 n. 6). The court informed the jury that the newspaper contained an inaccurate statement concerning the trial and ordered that the relevant page be removed from the paper that had come into the jury room (Tr. 460).

ARGUMENT

Petitioner contends (Pet. 8-22) that the trial court committed reversible error in refusing to question the jurors individually as to whether they had read the article published in the *Indianapolis Star*. He also urges this Court to resolve a conflict among the court of appeals concerning proper procedures for questioning jurors where prejudicial publicity has occurred during the course of the trial.

1. Petitioner exaggerates the extent of disagreement among the circuits. As he notes (Pet. 9), the First, Fourth and Seventh Circuits do not routinely require jurors to be questioned individually, out of the presence of the other jurors, as to whether they have seen or heard the particular prejudicial news item. Only if jurors indicate

that they have seen the particular article must those jurors be questioned individually. See, *e.g.*, *United States* v. *Perrotta*, 553 F. 2d 247 (C.A. 1); *United States* v. *Hankish*, 502 F. 2d 71 (C.A. 4); *Margoles* v. *United States*, 407 F. 2d 727 (C.A. 7), certiorari denied, 396 U.S. 833. But the Seventh and First Circuits have been careful to note that there may be circumstances when even the initial inquiry should be conducted individually, and to caution that the trial court should be sensitive to this possibility. See Pet. App. 42-43; *United States* v. *Perrotta*, *supra*, 553 F. 2d at 250 n. 6.

The Fifth and Ninth Circuits differ from the Seventh, First and Fourth Circuits. They have stated that conducting the initial inquiry individually is the "better practice" or the "safer practice," but these circuits also do not set a rigid rule. See *United States* v. *Polizzi*, 500 F. 2d 856, 880 (C.A. 9), certiorari denied, 419 U.S. 1120, *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5).[2]

Only the Tenth Circuit cases upon which petitioner relies (Pet. 19) (*Hall* v. *United States*, 396 F. 2d 428, certiorari denied, 393 U.S. 986; *Mares* v. *United States*, 383 F. 2d 805, certiorari denied, 394 U.S. 963) enunciate a general rule that the initial inquiry, to identify whether any of the jurors has seen or heard the prejudicial publicity, must be made individually and out of the presence of the other jurors. But even in those cases, the court had no occasion to determine if it would find

[2]The District of Columbia Circuit, in *Coppedge* v. *United States*, 272 F. 2d 504, certiorari denied, 368 U.S. 855, upon which petitioner relies to show a conflict among the circuits (Pet. 19), did not address the preliminary inquiry at all, but was concerned with the failure of the trial court to "address" the jurors who admitted to having seen certain news articles "as to the possible influence of articles upon each of them." 272 F. 2d at 508.

reversible error where, as here, a general inquiry disclosed that no juror had seen the article in question and there was no evidence that the jurors were being untruthful in their responses.[3]

We submit that such variations in approved practice as do exist among the circuits need not be resolved into a uniform rule by this Court. While interrogating jurors individually may cause them to be somewhat more forthcoming as to whether they have seen or heard a news item, the effect of individual questioning at this point is probably marginal. A juror should not be particularly reluctant to admit in open court that he saw a headline but did not read the article, particularly where the court's admonition is only against reading articles dealing with the trial.[4] Individual inquiry becomes appropriate later, in determining how much the juror saw and what effect this has on his ability to decide the case fairly. And while initial individual questioning may be of marginal usefulness in obtaining truthful answers, it has the disadvantage of emphasizing the matter and arousing jurors' suspicions.

The two lines of opinion on this issue are, we submit, so closely matched as to their advantages and disadvantages that variations in practice make little difference in the

[3]In *Mares*, *supra*, the jurors were not polled at all concerning prejudicial publicity, and this aggravated circumstance was held to constitute reversible error. In *Hall*, *supra*, failure to follow the rule set out in *Mares* did not result in reversal; the court affirmed because plaintiff did not object to the procedure followed, the publicity was relatively innocuous, and the trial court did conduct a general inquiry to determine which jurors had read the article and their ability to decide the case fairly (396 F. 2d at 429-430).

[4]In this case the jury was not forbidden from reading newspapers, but only told not to read accounts of the case (see, *e.g.*, Tr. 268, 434).

fairness accorded individual defendants. Either method accords an adequate measure of protection from prejudicial influences on the jury. There is therefore no need for this Court to prescribe a uniform rule.

2. In any event, the present case is not an appropriate one for resolving this issue, since the trial court's conduct would probably have been upheld by any of the courts upon whose opinions petitioner relies (Pet. 19). The article was not located in a prominent position in the paper. No juror indicated that he gave any more than a cursory glance at the paper, and the two jurors who had looked at the paper said they had not seen the particular article. The item was brought to the court's attention on the morning of its publication, and the jury was questioned and cautioned immediately thereafter. Moreover, throughout the trial the court repeatedly admonished the jury to avoid newspaper and media accounts of the trial (see, *e.g.*, Tr. 268, 434). There is no reason to believe that the jurors disobeyed these express instructions—a conclusion that cannot be lightly drawn (*Opper* v. *United States*, 348 U.S. 84, 95)—or that they then lied about their actions when questioned by the trial court. In short, there is no indication whatsoever that individual questioning would have produced different responses from the jurors.[5]

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[5]Petitioner also argues (Pet. 21-22) that reversal is required in this case because the prejudice to him equalled that in *Marshall* v. *United States*, 360 U.S. 310. This claim is without merit. In *Marshall* seven jurors stated they had read one or more highly prejudicial articles that contained information excluded at trial. In the present case, by contrast, there is no evidence that any juror saw the article.

In these circumstances, it is not clear that even the Tenth Circuit would have ordered a new trial, and the Ninth and Fifth Circuits would probably have regarded the judge's actions as a harmless divergence from what those circuits regard as the better practice.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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